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In the

Supreme Court of the United States

October Term, 1963

No. 299

H. G. MAISON, individually and as Superintendent, Department o State Police of the State of Oregon; ROBERT Y. THORNTON, individually and as Attorney General of the State of Oregon; J. H. VAN WINKLE, MAX WILSON, RALPH T. RENNER, KENNETH G. DENMAN, and ROLLIN E. BOWLES, individually and as members of the State Game Commission of the State of Oregon; and GEORGE L. ANDERSON, individually and as District Attorney of Union County, Oregon,

Petitioners,

v.

CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, and Elias J. Quaempts, William Minthorn, David S. Hall; Joseph T. Johnson, Arthur Motanic, Joseph T. Williams, Louise M. Elk, and Jesse Jones, each on its or his own behal and as representative of the members of the Co ederated Tribes of the Umatilla Indian Reservatio. Pendleton, Oregon,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Contrary to Petitioners' apparent suggestion (Pet 3), it would not be necessary for this court to decide whether the State lacks authority to regulate Respondents' fishing under any and all conceivable circumstances or whether Federal courts are authorized to prescribe methods of conserving fish.

Properly stated, the issue presented is whether, under the particular facts found by the lower courts to exist in this case, the State may so utilize its general regulations, adopted for the ostensible purpose of conservation, as to prevent Respondents during extended periods of each year from taking fish for subsistence purposes only, at their usual and accustomed stations, in their pursuit of the right reserved by them and confirmed by the United States in the Treaty of June 9, 1855 (12 Stat 945, II Kappler 694), to take fish "at all * * * usual and accustomed stations * * *." The particular facts so found are:

(1) No limitations on such fishing are necessary for the conservation of fish.

(2) The general regulations attempted to be applied to Respondents were adopted in complete disregard of Respondents' needs and without any evidence or knowledge of the extent or effect of their fishing, other than that they had never been known to destroy or threaten any fish run.

(3) There are alternative conservation measures which may be taken to eliminate any theoretical harm done by such fishing.

RESPONDENTS' STATEMENT

Petitioners' "Statement" (Pet 3-9), exclusive of the

argumentative material on pages 7 to 8, is generally accurate. However, in the following particular respects, Petitioners' statement is inaccurate or insufficient:

This case concerns the subsistence fishing (as distinguished from commercial fishing) of the Confederated Tribes of the Umatilla Indian Reservation on certain tributaries of the Columbia and Snake rivers in Oregon which are in the general vicinity of the Umatilla Indian Reservation. The decree of the District Court, which was affirmed by the Court of Appeals for the Ninth Circuit, is a declaratory judgment, and provides in part as follows:

> "ORDERED, ADJUDGED, AND DECREED that the Confederated Tribes of the Umatilla Indian Reservation and the members thereof have a right, privilege, and immunity afforded them under the Treaty of June 9, 1855, between said Tribes and the United States of America, to catch salmon and steelhead for subsistence purposes at all usual and accustomed stations on tributaries of the Columbia and Snake rivers in Oregon, including the John Day, Walla Walla, Grande Ronde, and Imnaha river systems, without restriction or control under the game laws of the State of Oregon or regulations issued pursuant thereto." (Pet. Appendix F, p 50)

The record contains no support whatsoever for Petitioners' statement (Pet 4) to the effect that, following the completion of The Dalles Dam at Celilo Falls on the Columbia River in 1956, the Umatillas "began to"

fish in other places, setting the stage for this case." All the evidence in this case is to the effect that the Umatillas have traditionally and consistently utilized their usual and accustomed fishing places on the Blue Mountain streams involved in this case for subsistence fishing. Although it is true that many Umatillas engaged in substantial fishing activities at Celilo Falls prior to the inundation thereof in 1956, such fishing was primarily for commercial purposes. The fishing on the Blue Mountain streams is now and always has been for subsistence purposes. The condition of the anadromous fish by the time they reach the streams here involved is such that they are not commercially salable (See R 33-34, 38, 53-54, 58 (Finding 17), 85, 165-166).

Prior to 1914, the Umatillas also utilized the Umatilla River which flows through the Umatilla Reservation as a source of subsistence fishing. In about 1914, the United States Bureau of Reclamation constructed an irrigation dam about three miles above the mouth of the Umatilla River, outside the Reservation, and substantially destroyed the salmon and steelhead runs in that river. At the present time, the Blue Mountain streams here involved are the only practicable sources of supply for subsistence salmon and steelhead for many Indian families on the Reservation, who continue to depend upon these fish for their livelihood (R 88, 165-168).

The record also contains no information concerning the amounts referred to by Petitioners (Pet 4) as paid the Umatillas as a result of the inundation of Celilo Falls or the reasons therefor. We consider it highly inappropriate for Petitioners to refer to this matter at this stage of the proceedings, especially when they well know that the settlement agreement involved only the subordination of the Umatillas' rights in a limited area of the Columbia River in the vicinity of The Dalles, Oregon, many miles from the streams here involved, and that it has no relevance, in fact or in law, to the issue in this case.

Finally as pointed out in the argument, Petitioners' statement that when the salmon is in these streams it "is at its lowest ebb as a food item, but at its highest value as a propagator of its kind" (Pet 6) depends entirely upon one's point of view.

ARGUMENT

Summary of Argument

1. The lower courts were clearly right in finding that the restrictions on Respondents' subsistence fishing in the Blue Mountain streams are "not necessary for the conservation of fish."

A. Although Respondents have been engaged for 100 years in the fishing now sought to be pre-

prevented, the evidence shows that the fish runs involved have not been damaged by them and have been greatly increasing for 15 years.

B. The attempted restrictions seek to serve the interests of all other citizens without any regard whatsoever for the Treaty rights involved or the subsistence needs of the Indians.

C. Alternative conservation measures are available to eliminate any theoretical possibility of harm from Respondents' fishing.

2. The application of the test established by this court in the *Tulee* decision involves no new or novel principles requiring this court's consideration.

A. The lower courts correctly applied the test established by this court.

B. The Federal courts must continue to ascertain whether State-imposed restrictions on Indians' Treaty fishing rights are in fact necessary for the conservation of fish.

I.

The lower courts were clearly right in finding that the restrictions on respondents' subsistence fishing in the Blue Mountain streams are "not necessary for the conservation of fish."

This case does not require a decision on the basic question of whether the State is without any authority whatsoever to regulate Indians' fishing at Treaty fishing places outside their reservations. As much as any case, this one is "bottomed on its own facts." On the basis of the facts found in the two lower courts, it appears that in fact no restrictions on the subsistence fishing by members of this Indian tribe on the particular streams involved are now necessary; that the general regulations involved were adopted in 1958 without any regard or concern for the needs of the tribe or its members and without any evidence or knowledge concerning the effect or extent of their fishing, except that they had never been known to damage or threaten any fish run in the more than 100 years they have fished at these fishing places; and that there are at least three alternative conservation measures which may be adopted to prevent any harm to the fish runs which, according to the State, theoretically might result from their fishing.

A. Lack of Necessity. The Court of Appeals commented as follows concerning the necessity for the limitations attempted:

> "The trial judge could justifiably doubt the validity of the experts' conclusions in view of the other evidence that the number of fish taken by the plaintiffs is only a small percentage of the total salmon

and steelhead harvest; that the plaintiffs have never, in over a century, destroyed a salmon run in the Blue Mountain streams or so depleted a run that destruction was threatened; and that, not only has the number of fish in these streams been increasing in recent years, the population of the Confederated Tribes is small and probably is declining" (Pet., Appendix A, p 26; 311 F2d at p 173)

Included in the evidence supporting this analysis is the following:

Exhibits Nos. 14 to 30 summarize the salmon and steelhead runs and catches in the Columbia System. They were prepared by Doctor Richard Van Cleve, Dean of the College of Fisheries, University of Washington, on the basis of official records of State and Federal agencies and were introduced without objection (R 69-70).

At the time of trial the most recent year for which complete statistics of the chinook catch were available was 1957. In that year, of the 1,256,000 estimated run of Columbia River chinook salmon, the commercial fishermen's nets took 782,200, or more than 62 per cent. The sports fishermen of Oregon, Washington and Idaho took another 134,600 chinook. Of the entire run of chinook salmon the commercial and sports fishermen caught 916,000 fish, or approximately 73 per cent of the run (Exs 14, 19 and 20).

In 1957 the Washington State Department of Fisheries estimated the run of summer steelhead in the Columbia as 235,800 fish. This figure excludes sports catch and ocean troll catch of steelhead (Ex 16). In the same year, 1957, the gill net catch of all steelhead in the Columbia River was about 73,480 fish (figuring their weight as 10 pounds a fish, see Ex 21). The 1957 sports catch of all steelhead in Oregon was 24,783 fish (Ex 22); and in Idaho, 39,544 fish (Ex 23). Thus, the 1957 gill net and sports catch of Columbia River steelhead was approximately 137,807 fish.

The Blue Mountain Streams. On the Blue Mountain streams involved in this case there is no commercial fishing. But the State of Oregon does permit sportsmen to catch salmon and steelhead during most of the year. The 1957 sport catch figures published by the Oregon Game Commission are as follows:

River	*Salmon*	*Steelhead*	*Total*
Catherine Creek	177	18	195
Grande Ronde River	189	504	693
Imnaha River	302	508	810
John Day River	86	2,149	2,235
Minam	82	43	125
Walla Walla River	14	101	115
Wallowa River	134	107	241
Wenaha River	113	76	189
	1,097	3,668	4,603

(Exhibit 15)

There is no evidence that in 1957 or any other year Indian fishermen, trying to catch salmon and steelhead in these same streams to feed their families, caught as many as the 4,603 fish that white sportsmen caught for pleasure.

An important aspect of the salmon conservation problem is that *since 1944 the spring runs of chinook have been increasing*. As shown by Exhibit No. 16, the spring chinook run in 1944 was 56,300 fish. Since then it has continuously increased to 194,000 salmon in 1958. *It is the spring run of chinook that spawns in the Blue Mountain streams involved in this case* (R 91, Pet 4).

Consistent with the general increase of spring chinook runs in the Columbia is the increase of such runs in the two principal tributaries involved in this case, the Grande Ronde and the Imnaha rivers. In 1948, the chinook escapement in these streams was estimated at 900 and 1,500 fish, respectively. In 1956, it had increased to 8,092 and 5,030 fish (Ex 17). In 1958, the Oregon Game Commission estimated that 21,500 chinook entered the Grande Ronde, and 10,000 chinook entered the Imnaha (Ex 18).

Umatilla Subsistence Fishing. The fishing by the tribe and its members on the Blue Mountain streams involved in this case is for "subsistence" purposes only.

Subsistence fishing is fishing for their own use, as distinguished from commercial and sports fishing. (The fish here involved are not commercially salable.) Tribal members have traditionally utilized these streams for subsistence fishing. Of the 1,208 present members of the tribe, there are less than one half still living on the reservation, some of whom, of course, are aged or children. Most of those who use the streams in question live on the reservation. Sam Kash Kash, a tribal member, testified that the catching of 50 fish on one trip would be such an occurrence that it would be generally known. Neither Petitioners nor others have reason to believe that these Indians have ever destroyed or threatened the destruction of a fish run (See Finding 17, R 58; R 38, 44, 72-74, 79, 81, 85, 108, 116, 119-120, 125, 127-128, 133, 166)

One of Petitioners' experts was Richard T. Pressey, Chief Biologist and Supervisor of Research for the Department of Fisheries of the State of Washington, who testified on the basis of conservation principles generally. His testimony included the following:

> "The Court: Do you know how many Indians fish on those streams?
>
> "The Witness: No, sir; I do not.
>
> "The Court: Is it your view, based upon the reading which you have done, that there is real danger of the fish in the Blue Mountain streams being destroyed?

"The Witness: I believe so, if that fishing is up on the spawning grounds. This is something that should not be done, in my opinion.

"The Court: Is it because you believe that the Umatillas are not as cooperative as the Indians in Washington with whom you have had good relations?

"The Witness: Well, I can only speak from hearsay on that as I have only entered into—or that our Department has only entered into very preliminary negotiations with the Umatillas in regard to the Columbia River fisheries, and I am not intimately acquainted with that Tribe.

"The Court: Is there anything about the Umatillas which leads you to believe that they will try to completely wipe out the fishing in those Blue Mountain streams because they will fish it so hard?

"The Witness: Sir, I couldn't answer that. I don't know. * * *

"The Court: If you were acquainted with the fact that over a period of years they have fished without restriction and the runs are not being depleted, would that alter your opinion in any way?

"The Witness: *If the runs are not being depleted and there is no sign of depletion, there would be no need of regulation* * * *

"The Court: But the pragmatic test is one that determines whether the fish have actually been depleted even though unrestricted fishing has been permitted?

"The Witness: Yes, if you can deplete the stocks there, then you know you are in bad trouble." (R 149-152)

In the 100 years since the ratification of the Treaty of June 9, 1855, the State authorities had never attempted to interfere with the Umatillas' fishing (R 166). The State chose to do so in August of 1958 at a time when the fish runs involved had been dramatically increasing for 15 years. The lower courts simply held that, in view of the circumstances, such restrictions could not be considered "necessary for the conservation of fish" under any theory, in law or in fact, or through the exercise of any "judgment."

B. Failure to Consider Indians' Needs. After noting that none of Petitioners' experts had any knowledge of any harm resulting from the Umatillas' fishing, the Court of Appeals stated:

> "In Dr. Rayner's view, 'conservation' is a term which involves a compromise of the competing interests of the many groups of society that desire or need fish. Such a definition is reasonable. However, Dr. Rayner further explained that, by 'conservation,' the Oregon Game Commission seeks to protect only commercial and sports fishermen, having no regard for the welfare of Indians. If, as it is reasonable to believe, Dr. Rayner used the word 'conservation' in the sense that it was used by his employer, the Oregon Game Commission, when he testified to the necessity for conservation, he really meant, 'I believe that the regulations are necessary to conserve fish for commercial and sports fishermen, disregarding the needs of the Indians altogether.'
>
> "Such a statement is not evidence of that neces-

> sity for conservation' required by the Tulee case." (Pet, Appendix A, pp 24-25; 314 F2d at p 173)

These statements are fully supported by the record (R 105-107, 189).

Petitioners say that when the salmon is in these streams it is

> "* * * at its lowest ebb as a food item, but at its highest value as a propagator of its kind * * *. (Pet 6)

Whose food? Whose value?

According to the testimony, to feed their families many Umatilla Indians need to take more salmon than they can take by sportsmen's methods, they cannot use set gill nets or other commercial systems on the main stem of the Columbia River because of the costs and difficulties involved and other Oregon fishing regulations, and the Blue Mountain streams are their only practicable sources of supply (R 71-74, 88-89, 113, 130-132, 169). The Umatillas' interest in fishing on their usual and accustomed stations on the streams here involved fit neither of the two goals selected by Oregon —food obtained through commercial fishing in the lower Columbia, or recreation through angling on the upper streams.

The result is that the lower courts have simply held that the "determination" of the necessity which Petitioners claim the exclusive right to make (Pet 13) cannot stand when it is made without evidence of harm, in ignorance of the facts, and for the purpose of serving the needs of all the other citizens at the expense of the Indians who have preserved a part of their former culture.

Petitioners seemingly concede that their "determination" is not conclusive if their regulation "was not supported by substantial evidence, or * * * not reasonable or * * * arbitrary" (Pet 13). On the facts of this case the restrictions on the Umatillas' fishing offend each of these standards.

C. Alternative Conservation Measures. The District Court found:

> "18. The Court finds that there are alternative methods to the restriction of Indian fishing on Blue Mountain streams whereby the State of Oregon may achieve the conservation of salmon and steelhead runs: for example, permitting a greater escapement of spring chinook salmon through the commercial and sports fishery on the Columbia River below Bonneville Dam; reducing or eliminating the sports catch of salmon and steelhead on the Blue Mountain streams; and arranging substitute fishing sites for plaintiffs on the Columbia River to relieve fishing pressure on the spawning beds.
>
> "19. Plaintiffs have expressed their willingness to negotiate with the Oregon State Game Commis-

> sion, or other appropriate officials of the State of Oregon, for the substitution of subsistence salmon and steelhead fishing sites on the main stem of the Columbia River for usual and accustomed fishing sites on the spawning beds of tributaries of the Columbia River. The Oregon State Game Commission has rejected this offer." (Findings 18 and 19, R 58-59)

The Court of Appeals considered that the availability of the alternative of eliminating the sports fishing of salmon and steelhead on these same spawning grounds was sufficient to prevent the restrictions on the Umatillas' fishing there and did not consider the other alternatives (Pet. Appendix A, p 27; 314 F2d p 174).

We believe Petitioners' claim that the lower courts have "substituted [their] • • • view concerning what should be done" (Pet 13) is an inaccurate statement of the purpose of these holdings. All the Court of Appeals held is that the State cannot claim a "necessity" for preventing Umatillas from taking fish needed for food when it permits sportsmen to take more of the same fish, in the same places, for pleasure. The District Court applied the same reasoning regarding limitations on the tremendous commercial catch below Bonneville Dam and also could not believe the claims of necessity when the State officials refused to consider the Umatillas' offer to fish where, under Petitioners' theories (R 116), the theoretical possibility of harm would be alleviated.

2.

This application of the test established by this Court does not require this Court's consideration.

In *Tulee v. Washington* (1942) 315 US 681, this court held that the State of Washington could not apply its general license law to Yakima Indians fishing at their usual and accustomed fishing stations. The Yakimas' treaty (12 Stat 951, II Kappler 698) was negotiated at the same treaty council, was executed the same day, was ratified the same day and, so far as pertinent here, is virtually identical to the Umatillas' treaty. The court stated:

> "* * * while the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation *as are necessary* for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here. * * *
>
> "* * * The license fees prescribed are regulatory as well as revenue producing. But it is clear that their regulatory purpose could be accomplished *otherwise*, that the imposition of license fees is *not indispensable* to the effectiveness of a state conservation program." (315 US 684, 685)

The Court of Appeals for the Ninth Circuit has applied this decision three times. In *McCauley v. Makah Indian Tribe* (9 Cir. 1942) 128 F2d 907, it reversed a

decision by the District Court for the Western District of Washington which, on a motion for judgment on the complaint, had enjoined State officials from interfering with the Makah Indians' fishing in the Hoko River in Washington, regardless of the purpose of the fishing or the gear employed. Although the Treaty provision was in all material respects the same as the Umatillas', the Ninth Circuit held that:

> "Clearly, allowing such fishing is not in accord with Tulee v. State of Washington, 62 S.Ct. 862, 86 L. Ed.—, which was decided after the judgment here appealed from. * * *
>
> "The case seems to have been tried by both parties on the theory that the Indians had either all fishing rights on the Hoko River or only those of non-Indian citizens. It well may be that the Tulee case has decided all that the parties are seeking to determine regarding the Makah treaty provision. However, in reversing it is with permission to the appellees to amend their complaint and present the issue of their right to such claimed allowable methods of fishing, specifically described, and not by such a general term as 'other Indian fishing gear,' as they may be advised." (128 F2d 870

The same treaty was before that court in *Makah Indian Tribe v. Schoettler* (9 Cir, 1951) 192 F2d 224. This time the State was attempting to apply its general regulations to the Indians with the result that only hook and line could be used. This meant *in fact* that

really effective fishing could not be conducted because salmon do not eat after entering fresh water to spawn. The court held:

> "The Supreme Court held in the Tulee case that where a treaty guarantees certain fishing rights to Indians and a state regulation impairs this right, the state must prove that its regulation is 'necessary', and further held that such proof of the regulation there involved had not been made. . . .
>
> "We are not here concerned, as we were in McCauley v. Makah Indian tribe, 9 Cir., 128 F.2d 867, with any particular form of regulation. We do not question the right to enact regulations which will permit fishing in the Hoko River to the extent that will give the Makahs their treaty right to fish there without depletion of the fall run of salmon. We hold no more than that the appellee has not sustained its burden of proof that the instant regulations preventing the Makahs from the taking of fish in the Hoko are 'necessary for the conservation of fish' in the fall run of salmon in that river." (192 F2d 226)

The court listed as three factors which supported its belief that the particular regulations were not necessary the facts that (1) a partial stoppage of fishing during the run would in fact fully preserve it, (2) gill netting was allowed in other Western Washington streams, and (3) no attempt had been made to make a cooperative agreement with the Makahs which would both regulate and allow them the salmon "necessary for their food and support." (192 F2d at 225)

That court's third application of the *Tulee* decision was in the case now presented for review. In affirming the District Court, it stated:

> "Because the court found that no conservation was necessary its broadly worded judgment, applying to any laws or regulations of the State of Oregon, is proper. Of course, a substantial change in conditions may warrant the later imposition of restrictions upon plaintiffs' fishing." (Pet. Appendix A, p 26; 314 F2d at p 173)

We do not agree with Petitioners' claim that the lower courts "have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision." (Pet 14) On the contrary, they have closely followed the directions implicit in *Tulee*. In *Tulee* and *Makah*, too, the State authorities considered that their general regulations were in the interests of conservation and should apply to the Indians equally with all others. In both cases, a Federal court found the contentions fallacious as reasons for restricting Treaty fishing rights and pointed to the fact that there were other means which could accomplish the general conservation purpose and yet allow the Indians the food which they need for their subsistence.

We also believe that neither *Ward v. Race Horse* (1896) 163 US 504, *New York ex rel Kennedy v. Becker*

(1916) 241 US 556, nor *Organized Village of Kake v. Egan* (1962) 369 US 60, indicates any error by the lower courts.

Ward v. Race Horse, held that the admission of Wyoming to the Union on an "equal footing" with the other states had the effect of abrogating *pro tanto* an Indian treaty's provision granting "the right to hunt upon the unoccupied lands of the United States so long as * * * peace subsists * * * on the boarders of the hunting districts." (163 US 505) We believe that the dissent by Mr. Justice Brown in that case well demonstrated the weakness of the majority's reasoning regarding "equal footing." However that may be, the "equal footing" doctrine has no applicability here for two reasons. First, the Treaty here involved was ratified March 9, 1859 (12 Stat 945), subsequent to the admission of Oregon to the Union on February 14, 1859 (11 Stat 383). Second, this court held in *United States v. Winans* (1905) 198 US 371, 381, and *Tulee v. Washington* (1942) 315 US 681, that the corresponding provision in the Yakima Treaty survived the admission of Washington and necessarily held in *Seufert Bros. Co. v. United States* (1919) 249 US 194, that the same provision applied in Oregon. See, also, *Anthony v. Veatch* (1950) 189 Or 462, 485, 220 P2d 493, 503, 221 P2d 575.

Moreover, in view of the timing of ratification and

the foregoing interpretations, the rationale of *Ward v. Race Horse* actually works against Petitioners' position here, for the court there assumed that there was a necessary inconsistency between the continuation of the Indians' Treaty rights and the existence of State power to regulate them.

New York ex rel Kennedy v. Becker is distinguishable on the ground that it was in the form of a private grant of title to an individual with a reservation of a private easement in the Indians. As a matter of interpretation, the court held that the parties had not intended to limit the powers of the State. It was held in *United States v. Winans*, supra, and *Tulee v. Washington*, supra, that the powers of the State were limited by the Yakima treaty.

Organized Village of Kake v. Egan, supra, is likewise inapposite. It involved neither treaty rights nor any other Federally recognized rights. The holding of the court was that unrecognized, strictly aboriginal rights were subject to Alaska's prohibition of fish traps in the absence of a Federal expression to the effect that it lacked such power. On the spectrum of decisions involving Indians' fishing rights, the companion case of *Metlakatla Indian Community v. Egan* (1962) 369 US 45, is actually closer on its facts to the present case. In *Met-*

lakatla, the court held that Alaska's anti-fish trap law could not restrict the Indians in a "reservation" created by Congress subject to Federal regulations, even though it was not a reservation in "Indian Country" but was subject to State civil jurisdiction under 18 USC Sec 1162 and 28 USC Sec 1360. The analogy lies in the facts that the Umatillas' Treaty fishing right in "usual and accustomed stations" is in the nature of a "reservation" (*United States v. Winans*, supra, at 198 US 381) and they are likewise subject to 18 USC Sec 1162 and 28 USC Sec 1360, passed in 1953 (67 Stat 588). As noted in *Metlakatla*, subsection (b) of 18 USC Sec 1162 specifically provides:

> "Nothing in this section * * * shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

But these other decisions are beside the mark. *Tulee* held that states could regulate the rights here involved if "necessary for the conservation of fish" but invalidated the regulations before it because "their regulatory

purpose could be accomplished otherwise" and they were "not indispensable to the effectiveness of a state conservation program." (315 US 681, 685) Unless restrictions may somehow be necessary in law though not necessary in fact, it is clear that the lower courts have correctly applied this test. As in *Tulee* and *Makah Indian Tribe v. Schoettler* (9 Cir. 1951) 192 F2d 224, the Court of Appeals in this case was confronted with regulations which could be applied to the Indians only if their treaty accords "no right at all which the state is bound to respect in making its fishing regulations." (192 F2d at p 226)

The record of this case demonstrates better than any theoretical discussion the reason the Federal courts must continue to require proof in each case that the particular limitations attempted are in fact necessary for conservation where the treaty rights apply. The record shows that, however unfortunately, a famous statement from the nineteenth century remains true in many respects:

> "These Indian Tribes *are* the wards of the Nation. They are communities *dependent* on the United States; dependent largely for their daily food * * *. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the trea-

> fies in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court whenever the question has arisen." (*United States v. Kagama* (1886) 118 US 375, 383-384)

Faced with the State's value judgment under which their usual and accustomed fishing stations were in effect to be appropriated to breed the salmon and steelhead destined for the commercial fishermen's nets and the sportsmen's creel, the Umatillas have sought and received this promised protection from the courts below. There is no reason for further review of their decisions.

CONCLUSION

The Court of Appeals for the Ninth Circuit has applied the test established by this court in the *Tulee* decision in three cases, including this one, and has twice found that in fact the particular limitations on Indian fishing at Treaty protected fishing places were not "necessary for the conservation of fish." Its present decision is founded on a particular set of facts and presents no new or novel issues calling for this court's consideration.

It will be time enough to consider whether the State of Oregon has any power to regulate the exercise of

these Treaty rights when the State meets this test instead of trying to ignore the Treaty and the special needs it was intended to serve.

Respectfully submitted,

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